IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1036 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE N.G.NANDI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THAKOR GIGAJI DHULAJI

Versus

STATE OF GUJ

Appearance:

1. Criminal Appeal No. 1036 of 1994

MR BS PATEL WITH MR AI PATHAN for Petitioner No. 1

MR AJ DESAI, LD. APP for Respondent No. 1

CORAM : MR.JUSTICE N.G.NANDI
and
MR.JUSTICE M.C.PATEL

Date of decision: 07/08/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE N.G.NANDI)

1. The conviction recorded under section 302 and section 498-A I.P. Code and sentenced to suffer life imprisonment and fine of Rs.500/-, in default three months R.I.; AND three years R.I. and fine of Rs.1000/-, in default three months R.I. respectively, in Sessions Case No. 37 of 1992 vide Order and Judgment dated 3-10-1994 by Learned Addl.Sessions Judge, Mehsana, have been challenged by the appellant-convict in this appeal.

2. Facts leading to the filing of the present appeal shortly stated are that; Jashiben was married to Gigaji Dhulaji Thakor of village Shobhashan, Taluka Kheralu, District Mehsana; that after the marriage Jashiben was residing with her husband at the aforesaid village; that after the marriage Jashiben used to visit her parents also; that some days before the incident which took place on 30-6-1991 Jashiben returned to her matrimonial home as she had gone to her parents place to attend the marriage in her parental relation; that Jashiben used to tell her parents and other relations that as she had a white speck in her eye she is not liked by her husband and that, he used to ill-treat her by giving physical beating, thereby inflicting cruelty on her; that on 1-7-1991 at 23.00 hrs. father-in-law of Jashiben made a report in Vadnagar police station that his daughter-in-law i.e. Jashiben has died an accidental death whereupon an entry Accidental death No: 10/91 was recorded in the station diary of Vadnagar police station; that Ramiben Amrutaji the mother of Jashiben learnt from Sankarji that her daughter Jashiben has been pushed in the well by her husband Gigaji, whereupon the information received was got verified by sending a person to Shobhashan and on confirmation of the information complaint came to be lodged alleging murder of Jashiben by Gigaji with the allegations of cruelty. The offence was registered under Section 302 And 498-A I.P. Code against Gigaji. On completion of the usual investigation chargesheet came to be filed against Gigaji. The accused was committed to the Court of Sessions to stand trial. The charge was framed vide exhibit-9, the accused denied the charges levelled against him and claimed to be tried. The prosecution in order to bring home the guilt to the accused adduced oral as well as documentary evidence. After appreciating the oral and documentary evidence and further statement of the accused under section 313 Cr.P.C. the trial court found the accused guilty for the offence punishable under section 302 And section 498-A of I.P.Code and sentenced to suffer imprisonments with fine

as aforesaid. It is this conviction and sentences for the offence under section 302 And 498-A I.P. Code which have been assailed in the present appeal by the appellant-convict.

3. It is submitted by Mr. B.S. Patel, learned advocate for the appellant-convict that, there is no evidence to connect the accused with the offence alleged and that the death, looking to the evidence on record cannot be said to be a homicidal death; that the evidence of PW-5 Udaji cousin brother of deceased Jashiben is not reliable and believable in as much as he has been contradicted on material aspect. It is further submitted that looking to the state of evidence the conviction is required to be altered to section 306 I.P. Code.

It is submitted by Mr. A.J. Desai, learned APP for the respondent State that, in the instant case homicidal death of deceased Jashiben is established on evidence; that PW-5 Udaji last saw deceased Jashiben and accused Gigaji- her husband together at the well and that the dead body of Jashiben has been found from the said well; that PW-5 also heard both of them quarreling and advised them not to quarrel and go home.

4. We have reappreciated the evidence adduced before the trial court.

It is not in dispute that Jashiben some three years prior to the incident was married to Gigaji and was staying with her husband Gigaji at village Shobhashan. The incident took place on 30-6-1991. It is not much in dispute that the dead body of Jashiben was found from an unused well in the outskirts of village Shobhashan. It is suggested from the evidence that some few days prior to the incident Jashiben had returned to her matrimonial home with her husband Gigaji as she had gone to attend the marriage in her parental relation.

5. The evidence of PW-1 suggests that dead body of Jashiben was brought to Visnagar Civil Hospital, whereupon on 2-7-1991 along with Dr. Nayak she performed the postmortem examination. It is suggested from her evidence exh.12 as well as the postmortem note exh. 13 that deceased died because of asphyxia due to drowning. It is stated by PW-1 that the death must have occurred some 24 to 36 hours before the postmortem examination. Thus, according to medical evidence the cause of death is asphyxia due to drowning.

Thus it is amply suggested from the evidence of

PW-1 and postmortem note exh. 13 that deceased did not die a natural death.

6. Now coming to the incident, the evidence of PW-2 Ramiben Amartji suggests that she was told about the death of Jashiben by Sankarji that Jashiben was pushed in the well by her husband. Verification of the information received also revealed the death of Jashiben as her dead body was found from the well. As far as evidence of PW-2 is concerned all that she says is that she learnt from Sankarji that Jashiben died because she was pushed in the well by her husband Gigaji. As far as the incident is concerned evidence of PW-2 does not throw any light since she has been deposing only on the basis of what she has been told by Sankarji, the complaint exh.16 lodged by PW-2 is also on the basis of what she was told by Sankarji about the death of her daughter.

7. The evidence of PW-3 Ranuben Becharji suggests that deceased happened to be her niece and Gigaji happened to her brother-in-law,i.e. younger brother of the husband. Thus this witness is related to both. She has not said a word about the incident except saying that she heard that Jashiben was murdered by Gigaji by pushing her in the well.

Evidence of PW-6 Diwanji Javanji suggest that he learnt about the death of Jashiben from one Sambhuji and Manakaji of Shobhashan. PW-6 in turn informed PW-4 Khodaji Viraji about the information received in respect of the death of Jashiben. Thus the information to both these witnesses is by some other person and their evidence does not throw any light on as to how the incident took place. It is suggested from the evidence of PW-6 that after getting the information about the death of Jashiben he went to Jagapara and informed Sankarji, Sarpanch of the village and Sankarji (PW-7) called the parents of Jashiben and informed them accordingly. It is suggested from the evidence of PW-6 that, thereafter PW-4 and PW-6 went to village Shobhasan and at village Shobhasan they learnt from the talks in the village that Jashiben was pushed in the well and murdered. Thus from the evidence of PW- 4, 6 and 7 it would be seen that PW-6 Diwanji Javanji was informed by Manakaji and Shambuji, who in turn informed PW-4 and thenafter both went to PW-7 Sankarji the Sarpanch. Sankarji in turn informed the parents of Jashiben. But all that could be said is that the source of information is the talks in the village and no direct evidence as regards the incident leading to the death of Jashiben.

8. The evidence of PW-5 Udaji suggests that deceased Jashiben was her cousin sister, i.e. daughter of maternal uncle; that on 30-6-1991 he was going to village Aspha where his father in law has been residing, for the purpose of calling the wife of his brother-in-law as the wife of the brother of the witness had delivered a child at the place of the witness; that he went to village Valasana for catching the bus of 10.30 a.m. but as he missed the bus he was going on foot from Valasana to Aspha; that from a distance of about 40 ft. he saw that at the well in the outskirts of village Valasana his sister Jashiben and her husband Gigaji were quarrelling ; that the witness told both of them not to quarrel and go home. Thereafter the witness went to village Aspha to his father-in-law's place and on the next day he directly went to Vadnagar and then returned to Shobhashan. Thus according to PW-5 he last saw the deceased and her husband Gigaji together quarrelling with each other at the well in the outskirts of village Valasana. Prosecution relies on the evidence of PW-5 in order to establish the guilt of the convict.

In our opinion, the evidence of PW-5 does not deserve to be accepted for the purpose of establishing the homicidal death implicating the convict, for the simple reason that, in the examination-in-chief the witness deposed that he saw Jashiben and Gigaji quarrelling at the well and he advised them not to quarrel and to go home.

In the cross examination it has been suggested to the witness that he omitted to state in his previous statement about he having seen Jashiben and accused quarrelling and that he asked them not to quarrel and to go home. This witness ofcourse has denied to have omitted to state this fact in his previous statement. But this omission has been brought on record through the evidence of PW-10 the Investigating Officer. The Investigating Officer in his evidence has stated that he recorded the statement of witness Udaji; that the witness in the statement before him did not state that at the well his sister Jashiben and his brother-in-law the accused were quarrelling and that he told them not to quarrel and to go home. PW-5 having last seen the deceased and the accused together at the well quarrelling with each other and witness having advised them not to quarrel and to go home is a material omission which in our opinion would be fatal as far as the homicidal death of the deceased at the hands of the convict. It may be seen that there is no other evidence which could even remotely connect the accused with the homicidal death of

deceased Jashiben and at the hands of the accused. There is no evidence to the effect that the deceased and the accused left their house together or that they met on the way. The evidence on record in our view does not connect the accused with the homicidal death of the deceased.

9. As seen above in the instant case Jashiben has died by drowning. Thus the death of Jashiben is not natural. It is not the say of the prosecution that this is accidental death. Since the involvement of the accused with the homicidal death of Jashiben is not established on evidence, the death of Jashiben would be necessarily a suicidal death. As observed above, as deposed by PW-1 and noted in the postmortem report exh. 13 Jashiben died because of Asphyxia due to drowning. Thus all that can be said from the evidence on record is that Jashiben in the incident dated 30-6-1991 committed suicide and died a suicidal death.

10. It is suggested from the evidence of PW-2, 3, 4, 5, 6 and 7 that deceased Jashiben was not liked by her husband Gigaji as she had a speck in the eye. It is also suggested from the evidence on record that deceased was often subjected to physical beating and thereby accused treated her with cruelty. Thus the deceased was treated with physical as well as cruelty. These witnesses have deposed to the effect that Jashiben after her marriage used to come to her parents place and met the other relations also and used to tell them about the mental cruelty as she was not liked by her husband and also about the physical ill treatment meted out to her by her husband Gigaji. It is pertinent to note that nothing has been brought out from the cross examination of these witnesses as regards the deceased having been subjected to mental as well as physical cruelty. Even the accused in his further statement under section 313 Cr.P.C. has stated that deceased had Speck in her eye which according to the prosecution case was the reason as to why deceased was not liked by the accused. It may be seen that when even after three years of the marriage the wife is not liked by the husband for the reason which would be even prior to the marriage within the knowledge of the husband, namely speck in one of the eyes, as this cannot be concealed by any one and this would certainly cause mental agony to the wife. In our opinion, being not liked by the husband because of the speck in the eye and subjecting her to physical cruelty by the husband would lead a wife to commit suicide because, there would be no point in leading such a life when she is not liked by her husband with whom she has to stay for whole of her life. This mental cruelty would have serious effect on the

person concerned than physical cruelty. In our opinion, all these led the deceased to commit suicide and the cause for drowning herself to commit suicide has been provided by the accused husband. The accused can very well be said to have abetted Jashiben by his conduct towards her to commit suicide within seven years of the marriage, since the evidence on record disclosed that the deceased married the accused some three years prior to the incident, and therefore, presumption under section 113-A of the Evidence Act would arise in the present case.

11. Learned Trial Judge has found the accused guilty for the offence under Sectin 498-A I.P.Code also, and in our opinion, the conviction recorded by the trial court is justified on evidence on record. As far as the involvement of the convict is concerned the evidence suggests and as also submitted by learned advocate Mr. B.S. Patel for the appellant that the offence disclosed is under section 306 of I.P. Code, and therefore, in our view, the conviction is required to be altered from Section 302 I.P Code to Section 306 I.P. Code; over & above the conviction recorded for the offence punishable under section 498-A I.P. Code. Thus, in our view, on re-appreciation of evidence the appellant-accused is guilty for the offence under section 306 And section 498-A I.P. Code.

12. The appeal is therefore required to be partly allowed to the extent that the conviction recorded under section 302 I.P Code is altered to section 306 I.P. Code and appellant-convict is ordered to undergo Nine years R.I. and fine of Rs.500/-; in default R.I. for three months, confirming the conviction and the sentence imposed for the offence under Section 498-A I.P. Code.

13. In the result, the appeal is partly allowed. The conviction recorded against the appellant-convict by the trial Court for the offence under section 302 I.P. Code is altered to section 306 I.P.Code, and the appellant-convict is sentenced to suffer Nine years R.I. and fine of Rs.500/-; in default three months R.I. The conviction recorded and sentence imposed for the offence under section 498-A I.P. Code by the trial Court are also confirmed. Both the aforesaid sentences are ordered to run concurrently.

Date: 7-8-2003 (N.G. Nandi, J)

(M.C. Patel, J)

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